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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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INDEX.

	Page
Index	i
Table of cases	ii
Table of statutes	iv
Supplemental statement of the case	1
Summary of argument	9
Argument	12
Point I	12
Point I (a)	12
Point I (b)	17
Point I (c)	26
Point I (d)	27
Point II	29
Point II (a)	29
Point II (b)	32
Point II (c)	37
Point II (d)	38
Point II (e)	39
Appendix—Order of Interstate Commerce Commission, promulgated on March 13, 1911	43

Table of Cases Cited.

Aldredge v. Baltimore & O. R. R. Co., 20 F. (2d) 655	16
Atlantic Coast Line R. Co. v. Macon Grocery Co., 166 Fed. 206, 210 (C. C. A. 5th Cir.), affirmed 215 U. S. 501	34

Carey v. N. Y. Central R. Co., 250 N. Y. 345, 165 N. E. 805 19
Central Vermont R. Co. v. Perry, 10 F. (2d) 132, 133 .. 30
Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 178 18
Chicago etc. R. Co. v. Bolle, 284 U. S. 74, 77 18
Chicago etc. R. Co. v. Feightner, 75 Ind. App. 677, 687, 114 N. E. 659 19
Chicago etc. R. Co. v. Industrial Commission, 284 U. S. 296, 298 18
Chicago Junction R. Co. v. Industrial Board, 277 Ill. 512, 115 N. E. 390 19
Cohens v. Virginia, 6 Wheat. 264 37
Cound v. A. T. & S. F. R. Co., 173 Fed. 527, 532 35
Director General v. Ronald, 265 Fed. 128, 147 31
Erie R. Co. v. Welsh, 242 U. S. 303, 305 18
Ewing v. Coal & Coke R. Co., 82 W. Va. 427, 96 S. E. 73, 74 22
Gilbert v. David, 235 U. S. 561, 567 14
Grigsby v. Southern R. Co., 3 F. (2d) 988, 989, certiorari denied 268 U. S. 704 22
Illinois C. R. Co. v. Behrens, 233 U. S. 473, 476 18
Langness v. Green, 282 U. S. 531, 536 28
Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 184 ... 18
L. & N. R. Co. v. Meadors, 176 Ky. 765, 197 S. W. 440 19
Mayor v. Central Vermont R. Co., 26 F. (2d) 905, affirmed 26 F. (2d) 907 (C. C. A., 2nd Cir.) 18, 22
McCormick v. Walters, 134 U. S. 41, 43 34
Moran v. Central R. Co. of N. J., 88 N. J. L. 730, 96 Atl. 1023 (affirmed 245 U. S. 629) 19
Murray v. P. C. C. & St. L. R. Co., 263 Pa. 398, 107 Atl. 21, 22 19
Nashville v. Cooper, 6 Wall. 247 36

Newell v. B. & O. R. R. Co., 181 Fed. 698, 699..... 34
New Orleans, N. & T. R. Co. v. Mississippi, 102 U. S. 135 37
New York, N. H. & H. R. Co. v. Bezue, 284 U. S. 415, 420 18
Osborn v. The Bank of the U. S., 9 Wheat. 738..... 36
Patterson v. Director General, 115 S. C. 390, 105 S. E. 746, 748..... 19
Pennsylvania R. Co. v. Knox, 218 Fed. 748, 749..... 19
Re Keasbey & Mattison Co., 160 U. S. 221, 228, 229... 34
Rice v. Baltimore & O. R. R. Co., 42 F. (2d) 387, 393..15, 24
San Antonio etc. R. Co. v. Wagner, 241 U. S. 475, 484 30
Schauffele v. Director General, 276 Fed. 115, 116..... 22
Shauberger v. Erie R. Co., 25 F. (2d) 297, 298...18, 20, 22
Smith v. Detroit etc. R. Co., 175 Fed. 506, 507..... 35
Story Parchment Co. v. Patterson Parchment Co., 288 U. S. 555, 560..... 28
Tennessee v. Davis, 100 U. S. 257..... 37
Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39..... 30
Trapp v. B. & O. R. R. Co., 283 Fed. 655..... 34
Union Pacific R. Co. v. Myers, 115 U. S. 1..... 35
U. S. v. American Ry. Express Co., 265 U. S. 425, 435 28
Whittaker v. Illinois Central R. Co., 176 Fed. 130.... 34
W. H. Goff Co. v. Lamborn, 281 Fed. 613, 616 (C. C. A., 5th Cir.)..... 34
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 693, 694.....18, 20, 22

Table of Statutes Cited.

Burns' Annotated Indiana Statutes 1926, Sec. 389... 14
Employers' Liability Act of Kentucky.....35, 37, 39, 40
Federal Employers' Liability Act, 45 U. S. C. A. 51 .....2, 12, 13, 30, 35, 37

Federal Safety Appliance Act, 45 U. S. C. A. 1.....
.....2, 3, 10, 11, 12, 13, 29, 30, 35, 37, 38
Federal Safety Appliance Act, 45 U. S. C. A. 2, 15.... 29
Federal Safety Appliance Act, 45 U. S. C. A. 7..... 39
Judicial Code, Section 24, amended, 28 U. S. C. A. 41 31
Judicial Code, Section 51 (a), amended, 28 U. S. C. A. 112 (a).....13, 32
Orders of Interstate Commerce Commission of March 13, 1911.....2, 3, 30, 43
Practice Conformity Act, 28 U. S. C. A. 724..... 14

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT OF THE CASE.

The petitioner brought this action against the respondent in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, to recover damages for personal injuries alleged to have been sustained while he was employed as a switchman in re-

spondent's yards at Russell, Kentucky (R. 2). The complaint was in two paragraphs, each seeking to recover for the same injury. It was alleged in each paragraph that the injury was occasioned by a coupler which was defective, in that it failed to comply with certain requirements of the Federal Safety Appliance Act and the orders of the Interstate Commerce Commission thereunder promulgated.

The first paragraph alleged that respondent was engaged, and Moore was by it employed, in interstate commerce, and "that plaintiff brings this action * * * under and by virtue of an act of Congress of the United States, approved April 22nd, 1908, and amendments thereto, and which act is commonly known as the Federal Employers' Liability Act, and under a certain act of the Congress of the United States known as the Safety Appliance Acts and the Rules and Orders lawfully promulgated thereunder by the United States Interstate Commerce Commission: * * * that said laws of the United States give to this Court jurisdiction to hear and determine this cause of action." It was further alleged that respondent was doing business within the territorial limits of said District Court (R. 2).

The second paragraph, while alleging that respondent was engaged in interstate commerce, and doing business within the territorial limits of said District Court, alleged that Moore was employed by respondent in intrastate commerce. It further alleged that Moore was a resident of Fort Wayne, Indiana, and a citizen of Indiana, and that

respondent was a Virginia corporation and a citizen of Virginia, and "that plaintiff brings this action * * * under and by virtue of an act of the Congress of the United States, commonly known as the Safety Appliance Acts and the Rules and Orders promulgated by the Interstate Commerce Commission of the United States," and also under certain laws of Kentucky, which were therein set out (R. 7).

Respondent appeared specially and filed, in two paragraphs, a plea in abatement to the jurisdiction of the District Court. The first paragraph was directed to the first paragraph of complaint. It denied that Moore was engaged in interstate commerce at the time of his injury, and asserted that, by reason of such fact, the Court had no jurisdiction under the Employers' Liability Act. It further alleged that respondent was an inhabitant of the Eastern District of Virginia, and that, so far as jurisdiction might depend on the fact that the suit arose under the Federal Safety Appliance Act, it could not be brought in any other district than that whereof respondent was an inhabitant (R. 17).

The second paragraph of the plea in abatement was directed to the second paragraph of complaint. It denied that Moore was a resident of Fort Wayne or a citizen of Indiana—he came to Fort Wayne but two days before the complaint was filed (R. 1, 35) from his home in Ohio, where his family still lived (R. 29). It further alleged, however, that respondent was an inhabitant of the Eastern

District of Virginia, and that the action, arising under the act of Congress, commonly known as the Safety Appliance Acts, could not be brought by any original process or proceeding in any district other than the Eastern District of Virginia (R. 14).

The District Court sustained a demurrer to the first paragraph of the plea in abatement (R. 20). A preliminary hearing was had before the Court on the second paragraph of the plea, resulting in a finding and ruling against the respondent (R. 20, 37).

The sustaining of the demurrer to the first paragraph and the ruling on the second paragraph of this plea to the jurisdiction were assigned as error in the Circuit Court of Appeals (R. 115).

The case was submitted to the jury on the complaint and an answer in denial. The Court refused to withdraw either paragraph of complaint from the jury (R. 99, 101), but charged the jury upon both paragraphs (R. 101). The jury returned a general verdict in favor of the plaintiff, with nothing to indicate upon which paragraph it was based (R. 22), upon which the Court rendered judgment (R. 28).

There was no substantial dispute in the evidence as to the interstate or intrastate character of Moore's employment. Respondent maintains at Russell, Kentucky, a terminal, including a classification and assembly yard for the switching of cars and trains, and within the limits of these terminal yards both tracks and shops for the repair

of cars (R. 50, 55, 65, 77). Within and on the south side of the yards, and abutting on the north corporate line of a village called Raceland (65), is what is known as the light side shop repair yard, consisting of five tracks, numbered from 1 to 5. Upon these tracks are placed cars requiring light or running repairs (R. 43, 50, 79).

On the evening of November 27, or the morning of November 28, 1930, twenty-one cars were placed on repair track No. 2. Twenty were empty coal cars which had arrived at Russell in different trains at various times between November 19th and November 27th (R. 45, 49, 62, 70). Empty coal cars are brought to Russell for breaking up and assembly. They have no destination other than Russell. Cars that are "shopped" by the inspectors are switched out. Those in condition for road service are classified on various yard tracks and lined up preparatory to leaving. At such time it is not known where they will go, whether within or without the State of Kentucky. In like manner, when cars are switched off the light repair tracks and classified as good-order cars, setbacks and cars for the shops, it is not known whether the good-order cars will go to West Virginia or Kentucky. They are assembled into trains and their destination is then determined by the chief car distributor (R. 74, 77).

The remaining car and the most westerly one in the cut was C. & O. 61355, loaded with sand, en route from Vauces, Ohio, to Surveyor, West Virginia. It received

repairs occupying a few minutes some time between 7:30 a. m. and 4 p. m. on November 28 (R. 65); and was shown to have left Russell at 6:45 p. m. on November 28th by the report of the conductor of the train in which it was moved. It was set out at Barboursville, West Virginia, its train proceeding on to Hanley, West Virginia, some sixty-five miles east of Barboursville, where it arrived at 12:35 a. m. on November 29th. The car was shown to have left Barboursville in a train which left Huntington at 6:35 a. m. on November 29th, by the car report of the conductor of that train, and to have arrived at Hanley, West Virginia, at 4:55 p. m. on that day. It left Hanley at 8 a. m. on December 3rd, was set out at Quinnamont, and left that place at 1 p. m., arriving at Rowley at 2:30 p. m. It left Rowley at 4 p. m. and arrived at Mobscott at 6:25 p. m., all on December 3rd, and finally arrived at Surveyor at 1 p. m. on December 4th. Its presence in each of the various trains was shown by the car reports of the various conductors (R. 69, 70). Light running repairs were made to some fifteen of the remaining cars; one was marked "setback" and the balance were ordered to the shops for heavy repairs or paint jobs (R. 45, 46, 47).

Between 5 and 6 o'clock on the morning of November 29th, the crew of which Moore was a brakeman or switchman began switching this cut of cars, all of which were empty, off of shop track No. 2 (R. 51, 52, 74, 75). They were not making up trains, but doing yard switching or

classifying cars (R. 74). The engine, headed east, proceeded onto shop track No. 2, coupled onto the west end of the cut, and backed out onto the lead (R. 51, 55, 71, 74). The easternmost car was then cut off and, while Moore was attempting to cut off the next car, he became unbalanced and his hand was thrown under the wheel and mangled, resulting in its amputation (R. 53).

On the extreme west end of the cut, after the removal of car C&O 61355, and directly in front of the engine, were HV 21342 and C&O 33555 (R. 49). They were inspected on the shop track at Parsons Yard, Columbus, Ohio, on November 26th and November 24th, respectively, and were ordered sent to the Russell car shops for the repair of their sills, as indicated by cards called "B. F. 4" cards, tacked on the cars and containing information that they were consigned to C. V. Ratcliffe, who was the foreman of the Russell car shops, by order of C. F. Ehrman, car foreman at Columbus. It was the practice, after such cars arrived at Russell, for those there in charge to use their judgment as to making repairs (R. 38, 39). A car might be consigned to the shop on account of a break in a sill without the break being a serious one, and the extent of the break would determine whether the car was to continue in service without being first repaired (R. 95).

These cars arrived at Russell at 12:15 p. m. on November 27th (R. 70), and they were among the cars placed on shop track No. 2 on the evening of that day or the morning of November 28th. No repairs were made to them

while they were on the shop track (R. 47, 63) and they were not, in fact, taken to the Russell shops (R. 94).

They left Russell in a train at 3:10 p. m., November 29th, and arrived at Logan, West Virginia, at 10:20 p. m. on that day (R. 70).

Respondent moved the District Court to direct the jury to return a verdict in its favor for the reasons, among others, that the evidence was insufficient to establish the fact that the plaintiff was employed in interstate commerce at the time of receiving the injury complained of (R. 21), and assigned the overruling of this motion as error in the Circuit Court of Appeals (R. 117).

SUMMARY OF ARGUMENT.

POINT I.

The Judgment of the District Court Was Properly Reversed Because of Its Erroneous Rulings With Respect to Its Jurisdiction Over the Action Declared on in the First Paragraph of Complaint, for the Reasons That:

(a) The first paragraph of the plea in abatement, to which a demurrer was sustained, stated facts showing an absence of jurisdiction over the first paragraph of complaint.

(b) The evidence failed to establish the fact that the petitioner was employed in interstate commerce and a verdict for respondent should have been directed on that ground.

(c) Having failed to establish the interstate character of his employment, the petitioner is not entitled to again try this action in the District Court in which the same was instituted, and that part of the judgment of the Circuit Court of Appeals providing that he be granted permission to amend his first paragraph of complaint is a more favorable ruling than that to which he is entitled.

(d) Since the judgment of the District Court was properly reversed because of errors with respect to its jurisdiction over the first paragraph of complaint, the judg-

ment of the Circuit Court of Appeals ought not to be disturbed on account of questions relating to the reasons assigned for the reversal or the language used in its opinion.

POINT II.

The Judgment of the District Court Was Properly Reversed Because of Its Error in Ruling Against the Respondent on the Second Paragraph of Its Plea in Abatement, Challenging the Court's Jurisdiction Over the Second Paragraph of Complaint, for the Reasons That:

(a) The Circuit Court of Appeals correctly held that the action declared on in the second paragraph of complaint was brought under the Safety Appliance Act, and that the jurisdiction of federal courts generally was thereby invoked, not only on the ground of diversity of citizenship, but also on the ground that the suit arose under a law of the United States.

(b) Since jurisdiction was not founded ONLY on the fact that the action was between citizens of different states, it could be brought in no other district than that whereof the defendant was an inhabitant.

(c) The decision of the Circuit Court of Appeals, to the effect that the District Court was without jurisdiction over the action stated in the second paragraph of complaint, was based squarely on the ground that the action

was brought under the Federal Safety Appliance Act, thereby constituting a ground of federal jurisdiction other than diversity of citizenship.

(d) Any statement in the opinion to the effect that, ASSUMING that the action was based exclusively on the Kentucky Statutes, those statutes and the Safety Appliance Act could not be considered *pari materia*, for the reason that the latter act applies only to interstate commerce, is purely *obiter dictum* and affords no ground for the granting of a writ of certiorari.

(e) The fact that the action may have been brought under a statute of Kentucky as well as under a federal statute, and the question whether or not the two statutes are considered in *pari materia* or otherwise are wholly immaterial. So long as federal law forms an essential ingredient of the cause of action, federal courts have jurisdiction on the ground that the suit arises under a law of the United States.

ARGUMENT.

POINT I.

The Judgment of the District Court was Properly Reversed Because of Its Erroneous Rulings With Respect to Its Jurisdiction Over the Action Declared on in the First Paragraph of Complaint, for the Reasons That:

(a) **The first paragraph of the plea in abatement, to which a demurrer was sustained, stated facts showing an absence of jurisdiction over the first paragraph of complaint.**

The first paragraph of the complaint expressly invoked the jurisdiction of the District Court upon two separate grounds. It was alleged that the defendant was engaged and that plaintiff was employed in interstate commerce, and that the action was brought under and by virtue of an act of Congress known as the Federal Employers' Liability Act. It was further alleged that the action was brought under an act of Congress known as the Safety Appliance Acts and the rules and orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, and that this act also gave the Court jurisdiction to hear and determine the cause of action. The respondent was charged with the violation of the Safety Appliance Act and such rules and orders in some six particulars.

The first paragraph of the plea in abatement met the first ground of federal jurisdiction, namely, that the suit was within the Employers' Liability Act, with a challenge to the jurisdiction of federal courts generally over the cause of action by specifically denying each and all of the allegations of the complaint to the effect that the plaintiff was engaged in interstate commerce. It met the second ground of federal jurisdiction, namely, that the suit arose under the federal Safety Appliance Act, not by questioning the jurisdiction of federal courts generally over the cause of action, but by insisting that, by reason of the fact that the respondent was an inhabitant of the Eastern District of Virginia, the venue was improperly laid and the District Court was without jurisdiction because of the provisions of 28 U. S. C. A. 112 (a), providing that:

> "Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It is no doubt true that the defense that the Court was without jurisdiction because the plaintiff was not in fact engaged in interstate commerce, challenging, as it did, the jurisdiction of federal courts generally over the cause of action, could have been raised at any stage of the proceedings. The defense that, in so far as jurisdiction de-

pended upon the fact that the suit arose under the Safety Appliance Act, the same could be brought only in the district of the defendant's residence, was a defense questioning the territorial jurisdiction or venue of the court below, and would have been waived had it not been interposed at the first opportunity. Section 389 of Burns' Annotated Indiana Statutes 1926, made applicable by the Practice Conformity Act (28 U. S. C. A. 724), provides:

> "Pleadings denying the jurisdiction of the Court, or in abatement of the action and all dilatory pleadings, must be supported by affidavit. * * * An answer in abatement must precede, and cannot be pleaded with, an answer in bar, and the issue thereon must be tried first and separately."

It was held by this Court in Gilbert v. David, 235 U. S. 561, 567, that:

> "It is the duty of the defendant to bring the matter to the attention of the Court, in some proper way, where the facts are known upon which a want of jurisdiction appears."

It was, therefore, proper for, and the duty of, the respondent, at the outset of the litigation, to raise the question that, by reason of the fact that the petitioner was not in fact engaged in interstate commerce, the Court was without jurisdiction on the first ground on which its jurisdiction was invoked. It was absolutely essential that respondent, before pleading to the merits, raise the question

that, in so far as jurisdiction might depend upon the fact that the suit arose under the Safety Appliance Act, the District Court was without jurisdiction because the respondent was an inhabitant of another district.

Under the facts alleged in the first paragraph of the plea in abatement, and admitted by the demurrer, the Court had no jurisdiction over the first paragraph of complaint upon either of the grounds upon which its jurisdiction was sought to be invoked. In the face of this challenge to its jurisdiction, therefore, the District Court, at the outset, committed error in sustaining a demurrer to the paragraph of the plea in question and in assuming jurisdiction to try and determine the case.

The decisions of the Circuit Courts of Appeal are in harmony in holding that the question as to whether an employe is in fact engaged in interstate commerce is essentially a jurisdictional question.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 393, an action was brought against a Maryland railroad corporation in a federal District Court in Ohio, where the defendant was doing business, in which it was alleged that the parties were engaged in interstate commerce. The plaintiff failed to prove that he was engaged in interstate commerce, and the District Court directed a verdict for the defendant. The Circuit Court of Appeals for the Sixth Circuit held that

> "The judgment should recite that the plaintiff was not engaged in interstate commerce, and that, for that

reason, the case is dismissed for lack of jurisdiction in the Northern District of Ohio and without prejudice to a suit in the proper forum based upon any rights other than these given by the Employers' Liability Act."

In Aldredge v. Baltimore & O. R. Co., 20 F. (2d) 655, an action was brought in a state court in Missouri to recover damages, it being alleged that the plaintiff was employed by the defendant in interstate commerce. The defendant removed the case to a United States District Court in Missouri on the ground of diversity of citizenship, and in its petition for removal denied that the plaintiff was employed by it in interstate commerce. The plaintiff filed in the federal court a motion to remand, in which he reiterated that he was employed by the defendant in interstate commerce. It was contended by the plaintiff that the federal court, in passing on the motion to remand, did not have jurisdiction to determine the question as to whether or not the plaintiff was engaged in interstate commerce for the reason that that question went to the merits of his cause of action. The Circuit Court of Appeals for the Eighth Circuit held that, where the petition for removal traversed the allegations of the complaint, no issue was raised for determination on the motion to remand so far as the traverse related to facts alleged in the complaint which went to the merits of the cause, but that in so far as the traverse related to facts which conditioned jurisriction or removability, an issue was thus raised for determination. The Court say on page 658:

> "If plaintiff was engaged in interstate commerce, his cause of action was within the Federal Employers' Liability Act and not removable. The decision of the question, however, would not in any sense determine the merits of plaintiff's cause of action. It was a proper question for the Court to determine on the motion to remand. Our conclusion is that the federal court had jurisdiction to determine the question whether the plaintiff at the time of the accident was engaged in interstate commerce."

Since the question as to whether the petitioner was, in fact, engaged in interstate commerce was the question upon which the trial court's jurisdiction over the cause stated in the first paragraph of complaint depended, it was respondent's right, if indeed it was not its duty, to raise the question at the outset of the litigation by a plea denying that the petitioner was so engaged. Since the truth of the allegations of this paragraph of the plea was, so far as the question of jurisdiction was concerned, admitted by the demurrer, the District Court erred in sustaining the demurrer and in proceeding to try the cause.

(b) **The evidence failed to establish the fact that the petitioner was employed in interstate commerce and a verdict for respondent should have been directed on that ground.**

The question as to whether the plaintiff was engaged in interstate commerce is to be determined by the char-

acter of the work he was performing at the very moment of the injury. The fact that, prior to undertaking the task on which he was engaged, he may have been employed in interstate commerce; or that, upon completion of such task, he was expected to engage in another which would have been a part of interstate commerce, is wholly immaterial. The fact that cars which he assisted in moving had previously been employed in some interstate movement, or that they might subsequently be used in interstate commerce, would likewise be of no moment.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 476;
Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 178;
Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 184;
Erie R. Co. v. Welsh, 242 U. S. 303, 305;
Chicago etc. R. Co. v. Bolle, 284 U. S. 74, 77;
Chicago etc. R. Co. v. Ind. Com., 284 U. S. 296, 298;
N. Y. H. & H. R. Co. v. Bezue, 284 U. S. 415, 420;
Mayor v. Central Vt. R. Co., 26 F. (2d) 905, 907 (S. Dist. N. Y.), affirmed 26 F. (2d) 907 (C. C. A., 2nd Cir.).

Plaintiff was engaged in the switching of empty coal cars in a terminal yard or distribution point where they had been gathered together. The interstate character of any movement from other states had terminated when they had arrived at their stopping point in the yards and had been placed on the storage or repair tracks. Further movement of these cars would not partake of interstate

commerce until they had been definitely assigned to some interstate movement.

Pennsylvania R. Co. v. Knox, 218 Fed. 748, 749 (C. C. A. 3rd Cir.);
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 693, 694 (C. C. A. 2d Cir.);
Shauberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A. 6th Cir.);
C. & E. R. Co. v. Feightner, 75 Ind. App. 677, 687, 114 N. E. 659;
Moran v. Central R. Co. of N. J., 88 N. J. L. 730, 96 Atl. 1023 (affirmed, 245 U. S. 629);
L. & N. R. Co. v. Meadors, 176 Ky. 765, 197 S. W. 440;
Murray v. P. C. C. & St. L. R. Co., 263 Pa. 398, 107 Atl. 21, 22.

At the time of the plaintiff's injury it was not known whether the empty cars which he was engaged in switching would be placed in trains going outside the State of Kentucky or in trains moving wholly within the State of Kentucky, or whether they might be loaded with interstate freight or intrastate freight. Under such circumstances the switching of these empty cars did not partake of interstate commerce.

Carey v. N. Y. Central R. Co., 250 N. Y. 345, 165 N. E. 805;
Chicago Junction R. Co. v. Industrial Board, 277 Ill. 512, 115 N. E. 647;
Patterson v. Director General, 115 S. C. 390, 105 S. E. 746, 748.

It was contended on the trial that an interstate character was imparted to petitioner's work because the dominant purpose in the switching in which he was engaged was to reach the two most westerly cars in the cut, HV 21342 and C&O 33555, and take them to the shops for repairs, thus completing an interstate movement from Columbus, Ohio. There was no such dominant purpose; these cars were not taken to the shops; and had they been taken there the movement would have been purely a local one.

The car which the petitioner was attempting to uncouple was at the extreme east end of the cut. HV 21342 and C&O 33555 were on the extreme west end of the cut and were already coupled onto the engine. The cars were on the shop lead, a track leading to the shops (R. 51, 74), and the shops were located a mile to the west (R. 50). These two cars could obviously have been taken to the shops without the necessity of moving any other cars. The immediate work on which the petitioner was engaged was the uncoupling of two admittedly intrastate cars. This was an end in itself and was in no sense for the "dominant purpose" of "reaching" cars which were already attached to the engine.

Shauberger v. Erie R. Co., 26 F. (2d) 297;
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 694.

Cars H. V. 21342 and C. & O. 33555 were not taken to

the shops (R. 94), but left Russell at 3:10 p. m. on November 29 (R. 70).

Even had these cars been taken to the shops for repairs, their movement from the repair track, where they had been stored since their arrival some two days before, into the shop buildings would not, in any sense, have constituted interstate commerce. The Russell yards, embracing within their limits tracks on which cars were inspected, tracks on which cars were classified, tracks on which cars were repaired and enclosed buildings in which cars were repaired, comprised the Russell terminal. The fact that representatives of the company at Columbus contemplated that the cars in question, after their arrival at Russell, would, if those there in charge saw fit, be taken, in the course of the progress of the work, into the shop buildings to be repaired, would not prolong their interstate journey over the period during which they might remain on storage or repair tracks or be in the course of removal from such tracks to the shop buildings. Russell was the destination of these empty cars. They had there arrived, and after being switched out of their train had been placed on shop track No. 2, for the purpose, either of inspection—to determine whether the repairs suggested at Columbus should be made, for repair—if it was found that repairs which could be made on that track were advisable, or for storage—to await their removal to the enclosed shops. In either event their interstate journey had ended. They were in no sense instrumentalities of interstate commerce,

but were withdrawn from active service. Any subsequent movement from shop track No. 2, back over the route by which they had come, to the enclosed shops a mile or so to the west would have been a purely local or switching movement.

Schauffele v. Director General, 276 Fed. 115, 116;
Grigsby v. Southern R. Co., 3 F. (2d) 988, 989, certiorari denied 268 U. S. 704;
Shauberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A., 6th Cir.);
Ewing v. Coal & Coke R. Co., 82 W. Va. 427, 96 S. E. 73, 74.

The mere fact that, following the removal of the cut of cars in question from shop track No. 2, other cars employed in interstate commerce might be placed upon said track for repairs would not impart to the removal of the cut in question the character of interstate commerce.

Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 693, 694 (C. C. A., 2nd Cir.);
Mayor v. Central Ver. R. Co., 26 F. (2d) 905, 907, affirmed 26 F. (2d) 907 (C. C. A., 2nd Cir.).

The only loaded car in the cut which was placed on shop track No. 2 on the evening of November 27th or the morning of November 28th was C. & O. 61355. This car left Russell, however, at 6:45 o'clock on the evening of November 28th. The petitioner was not injured until about 6 o'clock on the morning of November 29th, and this car,

consequently, could not have been in the cut of cars which was being moved. No doubt can exist but that this car left Russell at the time stated. This was shown by the wheel report of the conductor of the train in which it was moved. It may be urged that, because of the possibility of human error, the conductor may have been mistaken in including this car on his wheel report among those comprising his train. This might be true if the question were dependent wholly upon the correctness of a single wheel report. In the course of its movement over the main and branch lines of the defendant company from Russell to its destination at Surveyor, however, this car was moved by six different trains. The wheel reports of the conductors of each of those trains disclosed the presence of this particular car in their respective trains. It was set out from the train in which it left Russell at Barboursville, West Virginia, and picked up by a train which left Huntington at 6:35 a. m. on November 29th (R. 70). This could not possibly have happened had it still been at Russell, Kentucky, at the time of plaintiff's injury, and in like manner it would have been impossible for this car to have been in any of the trains in which it was shown to have been moved by the wheel reports, had any of these records been incorrect. The record of the movement of the car from Russell to point of destination was absolutely complete and consistent. It is utterly inconceivable that all six of the conductors could have made a mistake in entering the

same identical car on their wheel reports if it had not, in fact, been included in their trains.

Conley, the conductor of the switching crew, was shown the repair list of the twenty-one cars which were on shop track No. 2 at 9 o'clock on the morning of November 28th, and was asked whether those were the cars which were removed from that track on November 29th, and he replied in the affirmative (R. 49, 75). His attention was not particularly directed to car C. & O. 61355 and he obviously intended to do no more than identify the list which had been made by the foreman of the repair gang as the list including the cars which he moved. He specifically stated (R. 75): **"These cars were empty."** His testimony cannot, therefore, be construed as saying that any car loaded with sand was included in those that he moved.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 389, relied upon by petitioner, an effort was made to show that certain cars, thereafter loaded and consigned for interstate shipment, were in the movement in connection with which the plaintiff was injured. The Court say:

> "But the evidence most clearly shows that none of these cars were in the Lumberport-Haywood movement, that they had been placed at the Dawson mine some hours before the accident. What there is in the testimony to throw any doubt on the certainty of this conclusion is so vague and inconclusive as to be negligible for any purpose. It is also shown that at about 10 o'clock, or about four hours after Rice's in-

jury and on the return trip of Rice's crew, seven empties were delivered to the Corona mine, which were loaded in the afternoon and thereafter weighed and billed and consigned for interstate shipment. The evidence that any of these Corona cars was in the cut at the time of the accident is so scant as to make such a conclusion very speculative. The fact question upon which there is even a conflict in testimony, being the existence of jurisdiction, should affirmatively and distinctly appear."

The petitioner seeks to gloss over the question as to whether the evidence in fact showed that he was engaged in interstate commerce by the statement, on page 23 of his brief, that the general verdict of the jury conclusively established in his favor the issue that he was employed in interstate commerce at the time that he sustained his injury. The record does not bear him out. There was nothing to indicate whether the jury's verdict was based on the first or the second paragraph of complaint. With equal plausibilty, therefore, it might be said that the verdict conclusively established in his favor the issue tendered by the second paragraph of complaint, to the effect that he was engaged, not in interstate, but in intrastate commerce.

(c) **Having failed to establish the interstate character of his employment, the petitioner is not entitled to again try this action in the District Court in which the same was instituted, and that part of the judgment of the Circuit Court of Appeals providing that he be granted permission to amend his first paragraph of complaint is a more favorable ruling than that to which he is entitled.**

The District Court, being manifestly without jurisdiction over the action declared on in the first paragraph of complaint under the pleadings, by reason of facts alleged in the plea to its jurisdiction and admitted by the demurrer, and being likewise without jurisdiction under the evidence, the Circuit Court of Appeals properly reversed the judgment. Petitioner's complaint is apparently directed, not to the fact that the judgment was reversed, but to the instructions that he be permitted to amend his first paragraph of complaint to conform exclusively to the theory that the acts complained of constituted a violation of the Federal Employers' Liability Act. He is not in a position to complain of these instructions because they were unduly favorable to him. Having been permitted after an erroneous ruling on the demurrer to the plea in abatement to once try his case and having failed to establish by evidence that he was engaged in interstate commerce, a verdict should have been directed against him or, at most, as in Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, his action should have been ordered dismissed for lack of jurisdiction without prejudice to a suit in the

proper forum, based on other rights than those given by the Employers' Liability Act.

(d) **Since the judgment of the District Court was properly reversed because of errors with respect to its jurisdiction over the first paragraph of complaint, the judgment of the Circuit Court of Appeals ought not to be disturbed on account of questions relating to the reasons assigned for the reversal or the language used in its opinion.**

There being a want of jurisdiction over the action stated in the first paragraph of complaint, both because the plea in abatement alleged and the demurrer thereto admitted that petitioner was not engaged in interstate commerce, and because the evidence failed to establish that petitioner was so engaged, the judgment of the Circuit Court of Appeals reversing the judgment of the District Court was clearly right. It ought not to be disturbed, nor should a writ of certiorari be granted for its review, merely because some question may arise as to the correctness of the particular ground on which the Court based its judgment of reversal, or because exceptions may be taken to some of the language employed in the opinion. It is settled beyond controversy that where there is any ground upon which the action of the Court from which an appeal is sought to be taken may be sustained, the judgment will be upheld, even though there may be a question

as to the particular ground or reason assigned for the action of the lower court.

Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555, 560;
Langness v. Green, 282 U. S. 531, 536;
U. S. v. American Railway Express Co., 265 U. S. 425, 435.

In the case last cited it is said:

"But it is likewise settled that an appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed."

POINT II.

The Judgment of the District Court Was Properly Reversed Because of Its Error in Ruling Against the Respondent on the Second Paragraph of Its Plea in Abatement, Challenging the Court's Jurisdiction Over the Second Paragraph of Complaint, for the Reasons That:

(a) **The Circuit Court of Appeals correctly held that the action declared on in the second paragraph of complaint was brought under the Safety Appliance Act, and that the jurisdiction of federal courts generally was thereby invoked, not only on the ground of diversity of citizenship, but also on the ground that the suit arose under a law of the United States.**

No possible doubt exists but that the action declared on in the second paragraph of the complaint arose under a law of the United States, namely, the Safety Appliance Act. The petitioner alleged: "That plaintiff brings this action against the defendant under and by virtue of an Act of the Congress of the United States commonly known as the Safety Appliance Act and the Rules and Orders promulgated by the Interstate Commerce Commission of the United States" (R. 7). It sought to charge respondent with a violation of this Act of Congress and such Rules and Orders of the Commission in some six particulars (R. 12).

45 U. S. C. A. 2, 15;

Order of Interstate Commerce Commission promulgated March 13, 1911 (see Appendix).

It has been many times held, and never denied, that the Safety Appliance Acts give to an employe, injured as a result of their violation, a right of action for the injuries thus sustained.

In San Antonio etc. R. Co. v. Wagner, 241 U. S. 475, 484, cited by petitioner, the following language from Texas & P. R. Co. v. Rigsby, 241 U. S. 33, is quoted:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted the right to recover the damages from the party in default is implied."

In Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, it is further said:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employe; but the safety of employes and travelers is their principal object, and the right of private action by an injured employe, even without the Employers' Liability Act, has never been doubted."

In Central Vermont Ry. Co. v. Perry, 10 F. (2d) 132, 133, cited by petitioner, it is said:

> "The Safety Appliance Act supplementing and en-

larging the provisions of the Act of March 2, 1893, all of which were enacted 'to promote the safety of employes and travelers upon railroads,' impose an absolute duty upon common carriers by rail to equip their cars with certain appliances and their locomotives with safe and suitable boilers and appurtenances and although these provisions of law do not in express terms confer a right of action upon an employe injured because of a failure to comply with such requirements, it has been held that by implication they give him a right of action for personal injuries not resulting in death."

To the same effect is Director General v. Ronald, 265 Fed. 128, 147, likewise cited by petitioner, in which it was held that the plaintiff might recover irrespective of his engagement in interstate commerce. The following language is used in the concurring opinion:

"Liability is expressed and fixed by the statute (Safety Appliance Act) itself and is to be found therein."

It follows from the foregoing authorities that an action by an employe for personal injuries, resulting from an alleged violation of the Safety Appliance Act on the part of his employer, is conferred by and necessarily arises out of that act. This being true, jurisdiction to hear and determine such a cause of action is conferred upon the federal district courts by the express provision of 28 U. S. C. A. 41 (Judicial Code, Section 24), which provides:

"The District Courts shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and arises under the Constitution or laws of the United States."

The second paragraph of complaint, by expressly alleging that the action was brought under the Act of Congress commonly known as the Safety Appliance Acts, and by seeking a recovery on no grounds other than an alleged violation of that act, clearly invoked the jurisdiction of federal courts on the ground that the action was a suit of a civil nature arising under a law of the United States.

(b) **Since jurisdiction was not founded ONLY on the fact that the action was between citizens of different states, it could be brought in no other district than that whereof the defendant was an inhabitant.**

The venue of the suit stated in the second paragraph of complaint is controlled by the general venue provision of 28 U. S. C. A. 112 (a) (Judicial Code, Section 51, amended), which provides:

"Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of

different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Respondent, appearing specially, filed its plea in abatement to the jurisdiction of the Court (R. 14), in which it alleged that it was at all times

> "an inhabitant of the Eastern District of Virginia, and that the action declared upon in said paragraph of complaint being brought against the defendant and arising under and by virtue of an act of the Congress of the United States commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district than said Eastern District of Virginia, whereof it is an inhabitant as aforesaid."

The fact that respondent was an inhabitant of Virginia was admitted by the complaint and established by the evidence, and, in finding against the respondent upon and in overruling this paragraph of its plea in abatement, the District Court committed error, for which its judgment was necessarily reversed by the Circuit Court of Appeals.

It is true that the petitioner also invoked the jurisdiction of the District Court over the action declared upon in his second paragraph of complaint upon the ground of diversity of citizenship by alleging that he was a citizen

of Indiana and respondent a citizen of Virginia. He alleged that he was a resident of, and that respondent was doing business in, the Ft. Wayne Division of the Northern District of Indiana, and claimed the right to there maintain the action under the authority of the exception contained in the section last quoted, authorizing the suit to be brought in the district of the residence of either the plaintiff or defendant. This he manifestly could not do because jurisdiction was not founded only on the fact that the action was between citizens of different states, but also upon the further fact that the suit arose under a law of the United States.

It has been many times held that where an action is within the general jurisdiction of the federal courts, both upon the ground of diversity of citizenship and because founded on a law of the United States, such action can be brought only in the district of which the defendant is an inhabitant.

McCormick Co. v. Walters, 134 U. S. 41, 43;
Re Keasbey & Mattison Co., 160 U. S. 221, 228, 229;
Whittaker v. Illinois Central R. Co., 176 Fed. 130 (E. Dist. La.);
W. H. Goff Co. v. Lamborn, 281 Fed. 613, 616 (C. C. A., 5th Cir.);
Trapp v. B. & O. R. R. Co., 283 Fed. 655;
Atlantic Coast Line R. Co. v. Macon Grocery Co., 166 Fed. 206, 210 (C. C. A., 5th Cir.), affirmed 215 U. S. 501;
Newell v. Baltimore etc. R. Co., 181 Fed. 698, 699 (W. Dist. Pa.);

Smith v. Detroit etc. R. Co., 175 Fed. 506, 507 (N. Dist. Ohio);
Cound v. A. T. & S. F. R. Co., 173 Fed. 527, 532 (West. Dist. Texas).

The fact that the petitioner alleged that he brought his action under the Employers' Liability Act of Kentucky as well as under the Federal Safety Appliance Act, does not have the slightest bearing upon the jurisdictional question in controversy. In order that federal jurisdiction may attach to a suit arising under a law of the United States it is in nowise essential that the action shall be based **solely** on federal law, or that the same may not in some of its aspects be affected or controlled by the common law or the statutory enactments of the states.

In Union Pacific R. Co. v. Myers, 115 U. S. 1, it was held that actions, some of them for personal injuries under the rules of the common law, arose under the laws of the United States by reason of the mere fact that the defendant corporations had been created by or were organized under acts of Congress. Manifestly, if a suit arises under a law of the United States merely because the defendant is a corporation organized pursuant to such a law, an action such as the case at bar, which is brought to recover damages on account of the alleged violation by the defendant of a law of Congress claimed to have been enacted for the protection of the plaintiff, arises under the law in question. In deciding the case last cited the Court, in re-

ferring to the decision of Judge Marshall in the case of Osborn v. The Bank of the United States, 9 Wheat. 738, say:

> "But as it was objected that several questions of general law might arise in a case, besides that which depended upon an act of Congress, the Court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws or treaties of the United States it is sufficient for the purposes of federal jurisdiction if the case necessarily involves a question depending upon such Constitution, laws or treaties."

The Court then quoted the following language of Chief Justice Marshall in the case last referred to:

> "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it."

In Nashville v. Cooper, 6 Wall. 247, the Supreme Court used this language:

> "Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

See, also:

New Orleans, N. & T. R. Co. v. Mississippi, 102 U. S. 135;
Cohens v. Virginia, 6 Wheat. 264;
Tennessee v. Davis, 100 U. S. 257.

(c) **The decision of the Circuit Court of Appeals, to the effect that the District Court was without jurisdiction over the action stated in the second paragraph of complaint, was based squarely on the ground that the action was brought under the Federal Safety Appliance Act, thereby constituting a ground of federal jurisdiction other than diversity of citizenship.**

Petitioner states, on page 28 of his brief, that the Circuit Court of Appeals based its decision that the District Court did not have jurisdiction of the cause of action stated in the second paragraph of the complaint on the premises that the Safety Appliance Act applies exclusively to interstate commerce and not to intrastate commerce, and that the Federal Safety Appliance Act is not in pari materia with the Employers' Liability Act of the State of Kentucky. The decision of the Circuit Court of Appeals was based on no such ground. The Court of Appeals say (R. 137):

> "We are convinced that appellee in his second paragraph attempted to state a cause of action under the Federal Safety Appliance Act as well as under the statutes of Kentucky, and he alleges facts therein,

which, if true, constituted a ground for federal jurisdiction other than diversity of citizenship. * * * that being the case, jurisdiction and venue were in the district of appellant's residence and not in the Northern District of Indiana."

(d) **Any statement in the opinion to the effect that, ASSUMING that the action was based exclusively on the Kentucky Statutes, those statutes and the Safety Appliance Act could not be considered *pari materia*, for the reason that the latter act applies only to interstate commerce, are purely *obiter dictum* and afford no ground for the granting of a writ of certiorari.**

In answering petitioner's contention that, notwithstanding his allegation that he brought his action under and by virtue of the Federal Safety Appliance Acts, his second paragraph of complaint should not be construed as founded thereon, the Circuit Court of Appeals, while holding that that paragraph was founded on the Safety Appliance Act, went on to say that **assuming** that the second paragraph was based exclusively upon the Kentucky statutes, those statutes and the Safety Appliance Act cannot be considered *pari materia* because the latter applies only to interstate commerce while the second paragraph of complaint alleged that both parties were engaged in intrastate commerce. This language of the Court was with reference to a state of facts which it held did not exist, was in no sense necessary to its decision of the case and was purely *obiter*

dictum. Clearly these remarks of the Court afford no ground for the reversal of the judgment of the Circuit Court of Appeals, nor for granting a writ of certiorari for its review.

(e) **The fact that the action may have been brought under a statute of Kentucky, as well as under a federal statute, and the question whether or not the two statutes are considered *in pari materia* or otherwise are wholly immaterial. So long as federal law forms an essential ingredient of the cause of action, federal courts have jurisdiction on the ground that the suit arises under a law of the United States.**

The fact that the action is brought under the Kentucky Employers' Liability Act, as well as the Federal Safety Appliance Act, has no bearing upon the question of jurisdiction under consideration. The gravamen of the suit is the alleged violation of the federal statute and the resultant injury. The cause of action would have existed without any employers' liability act, state or federal. The only effect of the Kentucky Employers' Liability Act on this particular cause of action was in the limitation of the defenses which might be interposed, and, so far as eliminating the defense of assumption of risk is concerned, the Kentucky Statute is inoperative, as this defense is taken away by the Safety Appliance Act itself.

45 U. S. C. A. 7.

It makes not the slightest difference in this case whether the Safety Appliance Act and the Kentucky Employers' Liability Act are to be construed *in pari materia* or otherwise. The Federal Safety Appliance Act is, in either case, an essential ingredient in the cause of action and affords a ground of federal jurisdiction.

Irrespective of any question as to the jurisdiction over the action declared on in the first paragraph of complaint, the judgment of the District Court was properly and necessarily reversed because of its error with respect to its jurisdiction over the action declared upon in the second paragraph. There is nothing in the record to show that the jury's verdict was not based on the second paragraph. The action declared on in that paragraph arose under a law of the United States and the jurisdiction of the federal courts thereby attached. Such jurisdiction was not founded solely on the ground of diversity of citizenship, and the action can be maintained only in the district of the respondent's residence. On this very ground the Circuit Court of Appeals reversed the judgment. Petitioner is not entitled to maintain in the United States District Court at Fort Wayne an action based both on the Federal Safety Appliance Act and the Kentucky statute regulating the liability of railroads for injuries to intrastate employes, and he is certainly in no position to complain of the instructions of the Circuit Court of Appeals, that he be permitted to amend his second para-

graph of complaint to conform exclusively to the theory that the acts complained of constitute a violation of the Kentucky Employers' Liability Act.

It is, with great respect, submitted that the writ of certiorari be denied.

ALBERT H. COLE,
Counsel for Respondent.

APPENDIX.

The order or rules of the Interstate Commerce Commission, promulgated on March 13, 1911, with reference to uncoupling levers, is as follows:

"Uncoupling Levers:

"Number: Two (2).

"Uncoupling levers may be either single or double, and of any efficient design.

"Dimensions: Handles of uncoupling levers, except those shown on plate B or of similar designs, shall be not more than six (6) inches from sides of car.

"Uncoupling levers of design shown on plate B and of similar designs shall conform to the following prescribed limits:

"Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift arms shall be not less than seven (7) inches long.

"Center of eye at end of center lift arm shall be not more than three and one-half (3½) inches beyond center of eye of uncoupling pin of coupler when horn of coupler is against the buffer block or end sill. (See pl. B.)

"Ends of handles shall extend not less than four (4) inches below bottom of end sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See pl. B.)

"Handles of uncoupling levers of the 'rocking' or 'push-down' type shall be not less than eighteen (18) inches from top of rail when lock block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

"Location: One (1) on each end of car.

"When single lever is used, it shall be placed on left side of end of car."